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No. _____

ALEXANDER L. STEVAS,
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In The
Supreme Court of the United States
October Term, 1988

STATE OF IDAHO,

Petitioner,
and

MEMBERSHIP OF HEYBURN STATE PARK LEASE-HOLDERS ASSOCIATION,

Intervenor/Petitioner,

vs.

THE COEUR D'ALENE TRIBE OF INDIANS,

Intervenor/Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

JIM JONES
Attorney General of Idaho

ROBIE G. RUSSELL
Deputy Attorney General
State of Idaho

C. A. DAW
Deputy Attorney General
State of Idaho
Room 210, Statehouse
Boise, Idaho 83720
Telephone: (208) 334-2400



QUESTIONS PRESENTED

- I. Whether the federal trust responsibility as to Indian lands extends to former Coeur d'Alene Reservation lands withdrawn and reserved from allotment and settlement and sold to the State of Idaho for use as a public park such that a right of reentry in the patent to enforce park use runs solely to the United States or beneficially to the Coeur d'Alene Tribe.
- II. Whether the Ninth Circuit was correct in extending the rule set forth in *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920), to include lands patented to the State of Idaho.
- III. Whether the United States' decision to voluntarily dismiss its appeal from the adverse judgment of the United States District Court for the District of Idaho precludes the Tribe from appealing the matter.

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinion Below	2
Jurisdiction	2
Relevant Statutes	3
Statement of the Case	5
Argument:	
I. The 1908 Act Authorizing the Sale of the Heyburn State Park Lands to the State of Idaho Extinguished Indian Title, Disestablished the Coeur d'Alene Reservation, and Ended Trust Status as to Those Lands. As a Result Thereof, the Right of Reentry Inserted in the 1911 Patent Runs to the United States Legally and Beneficially.	9
II. The Ninth Circuit Erred When it Extended the Rule in <i>Ash Sheep Co. v. United States</i> , 252 U.S. 159 (1920) to the Lands Conveyed to the State of Idaho.	11
III. Voluntary Dismissal by the United States Precludes the Tribe from Appealing this Matter.	11
Conclusion	15

TABLE OF AUTHORITIES

CASES:	Pages
<i>Arizona v. California</i> , 51 U.S.L.W. 4325, 75 L.Ed.2d 318, 103 S.Ct. — (1983)	13, 14
<i>Ash Sheep Co. v. United States</i> , 252 U.S. 159 (1920)	8, 11
<i>Cheyenne River Sioux Indians v. United States</i> , 338 F.2d 906 (8th Cir. 1964), cert. denied, 382 U.S. 815, 86 S.Ct. 34, 15 L.Ed.2d 62 (1965)	13
<i>Chicago R.I. & P.R. Co. v. Schendel</i> , 270 U.S. 611 (1925)	12
<i>City of New Orleans v. Dukes</i> , 427 U.S. 297 (1976)	9
<i>Heckman v. United States</i> , 224 U.S. 413 (1912)	12, 13
<i>Lone Wolf v. Hitchcock</i> , 187 U.S. 566 (1903)	5
<i>Mars v. McDougal</i> , 40 F.2d 247 (10th Cir. 1930)	13
<i>Pueblo of Picuris v. Abeyta</i> , 50 F.2d 12, 13 (10th Cir. 1931)	13
<i>Rosebud Sioux Tribe v. Kneip</i> , 430 U.S. 584 (1977)	8
<i>Solem v. Bartlett</i> , — U.S. —, 52 USLW 4257 (1984) at n.12	11
<i>United States v. Santa Fe Railroad</i> , 314 U.S. 339 (1941)	10
<i>United States v. Truckee-Carson Irrig. Dist.</i> , 649 F.2d 1286, 1306-7 (1981)	13, 14
STATUTES:	
1911 Idaho Sess. Laws, Ch. 89, §§ 1-2, p. 335	7
35 Stat. 70, 79	10
28 U.S.C. §1245	2
28 U.S.C. § 1345	7
28 U.S.C. § 1362	8
28 U.S.C. § 2201	7

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS:	Pages
Coeur d'Alene Allotment and Settlement Act of 1906, 34 Stat. 335, III Kappler 204	3
Heyburn Act of 1908, 35 Stat. 70, 78, III Kappler 326	4, 6, 10

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**PETITION FOR WRIT OF CERTIORARI TO THE
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THE NINTH CIRCUIT**

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Petitioners pray that a Writ of Certiorari be issued to the United States Court of Appeals for the Ninth Circuit to review the Opinion of December 1, 1983, No. 80-3013.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 710 F.2d 1461 (9th Cir., 1983). A copy is appended as Exhibit I. The Ninth Circuit's order denying the joint petition for rehearing is not reported. A copy of the order is appended as Exhibit II. The Ninth Circuit's initial Order of Remand is not reported. A copy is appended as Exhibit III. The order of the Ninth Circuit denying the Tribe's petition for rehearing on the dismissal of the United States' appeal is not reported. A copy is appended as Exhibit IV. The United States District Court for the District of Idaho's Opinions on remand is reported at 566 F.Supp. 15 (D. Idaho 1982). A copy is appended as Exhibit V. Copies of the unreported orders and memoranda of the district court are appended as Exhibit VIa-VId.

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JURISDICTION

Jurisdiction to issue the Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit is invoked under 28 U.S.C. § 1245. The opinion to be reviewed was issued on December 1, 1983. The State of Idaho, the Heyburn State Park Leaseholders Association and the Coeur d'Alene Tribe joined in a timely petition for rehearing. The Order denying the joint petition for rehearing was issued February 15, 1984.

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RELEVANT STATUTES

The Coeur d'Alene Allotment and Settlement Act of 1906, 34 Stat. 235, III Kappler 204, provides in relevant part:

That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of unallotted lands in the Coeur d'Alene Indian Reservation, in the State of Idaho.

That as soon as the lands embraced within the Coeur d'Alene Indian Reservation shall have been surveyed, the Secretary of the Interior shall cause allotments of the same to be made to all persons belonging to or having tribal relations on said Coeur d'Alene Indian Reservation, to each man, woman, and child one hundred and sixty acres, . . .

That upon the completion of said allotments to said Indians the residue or surplus lands . . . of the said Coeur d'Alene Indian Reservation shall be classified under the direction of the Secretary of the Interior . . . and shall be appraised under their appropriate classes . . . and, upon completion of the classification and appraisement, such surplus lands shall be opened to settlement and entry, under the provisions of the homestead laws, . . .

That the net proceeds arising from the sale and disposition of the lands aforesaid . . . shall be . . . deposited in the Treasury of the United States to the credit of the Coeur d'Alene and confederated tribes of Indians . . . and shall be expended for their benefit, under the direction of the Secretary of the Interior,

. . .

That nothing in this act contained shall be construed to bind the United States to find purchasers for any of said lands, it being the purpose of this act merely to have the United States to act as trustee for

said Indians in the disposition and sales of said lands and to expend or pay over to them the net proceeds derived from the sales as herein provided.

The full text of this statute is appended as Exhibit VII.

The Heyburn Act of 1908, 35 Stat. 70, 78, III Kappler 326, provides in relevant part:

That the land in the following subdivisions now embraced in the Coeur d'Alene Indian Reservation in Idaho, to-wit: . . . is reserved and withdrawn from allotment and settlement, and the Secretary of the Interior is hereby authorized to convey any part thereof to the State of Idaho to be maintained by said State as a public park, and conveyance to be made for such consideration and upon such terms and conditions as the Secretary of the Interior shall prescribe. The proceeds of such sale shall be deposited in the Treasury of the United States for the use and benefit of the Coeur d'Alene Indians in such manner as Congress shall hereafter prescribe.

The full text of this statute is appended as Exhibit VIII.

The presidential patent of June 29, 1911, provides in relevant part:

Whereas, the Act of Congress approved April 30, 1908—35 Stat., 70, 78—, authorizes the conveyance to the state of Idaho of the following described subdivisions or any part thereof, formerly a part of the Coeur D'Alene Indian Reservation in Idaho, . . . to be maintained by said state as a public park, for such consideration and upon such terms and conditions as the Secretary of the Interior shall prescribe; and

Whereas, by appraisement under direction of and approved by the Secretary of the Interior, the purchase price to be paid by the State of Idaho for the said lands has been fixed at \$11,379.17, and said Secretary has directed that said lands be conveyed

to the State, upon payment by it of said sum, upon the following terms and conditions, to wit: the lands are to be by said state held, used, and maintained solely as a public park, and for no purpose inconsistent therewith, the title to revert to the United States of America, absolutely if the said lands, or any portion thereof, shall not be, or shall cease to be, so used and maintained by the state, or shall be alienated by said state; . . .

The full text of the patent is appended as Exhibit IX.

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STATEMENT OF THE CASE

The Coeur d'Alene Indian Reservation in northern Idaho was established by Executive Order of President Grant in 1873. In 1906, the "familiar forces" of western land policy persuaded Congress to open the reservation for allotment and settlement. One hundred sixty acres were allotted to each tribal member and the balance of the reservation opened to homestead entry and settlement. The United States was charged with acting as trustee for the Tribe in disposing of the unallotted lands and applying the proceeds for the Tribe's benefit. Before allotment and settlement were initiated, a consensus formed to establish a park on the southern part of the reservation. The Coeur d'Alene Tribe unanimously voted for the establishment of a park, recognizing the probability that timber interests would obtain the land and divest the Tribe of their hunting, fishing and reunion rights frequently exercised on these lands.

At this time, Congress knew of its full authority over Indian affairs which had been confirmed in *Lone Wolf v.*

Hitchcock, 187 U.S. 566 (1903). However, Congress was also concerned over the cost of the establishment of a federal park. The combination of these factors resulted in the Heyburn Act of 1908, 35 Stat. 70, 78, which "reserved and withdraw(ew) from allotment and settlement" 6,774.65 acres which had been subject to disposition. The Secretary of Interior was authorized to convey these lands to the State of Idaho to be maintained as a public park. The Secretary was directed to specify the consideration, terms and conditions of the sale, and deposit the proceeds in the United States Treasury, for the benefit of the Tribe.

The entire 6,774.65 acres were conveyed to the State of Idaho by presidential patent of June 29, 1911, in exchange for payment of the appraised value of \$11,379.17. Payment was made to the United States Treasury as directed. The patent provided in relevant part:

Whereas, the Act of Congress . . . authorizes the conveyance to the State of Idaho of the following described subdivisions . . . , formerly a part of the *Coeur d'Alene Indian Reservation* in Idaho . . .

Whereas, by appraisement under direction of and approved by the Secretary of the Interior, the purchase price to be paid by the State of Idaho for the said lands has been fixed at \$11,379.17 and said Secretary has directed that said lands be conveyed to the state, upon payment . . . , upon the following terms and conditions, to wit: *the lands are to be by said state held, used, and maintained solely as a public park, . . . , the title to revert to the United States absolutely if the said lands, . . . , shall not be, . . . , so used and maintained by the state, . . . and in the event of the violation by the state of any of the conditions . . . , then the United States may . . . enter upon, and into the exclusive possession of, the said lands,*

... , and have, hold, seize, and possess the same: . . .
[Emphasis added]

All parties and courts have agreed that this patent language creates a fee simple subject to a condition subsequent giving rise to a right of reentry. This controversy arises from the right of reentry; the conditions under which it may be exercised and its legal and beneficial ownership.

At the time of conveyance, there were approximately 200 floathomes and several summer cabins leased to private parties within the proposed park lands. Immediately after purchase, these lands were established as Heyburn Park. 1911 Idaho Sess. Laws, Ch. 89, §§ 1-2, p. 335 (Exhibit X). The State of Idaho continued the practice of leasing float-homes and summer cottage sites after conveyance, by issuing ten year renewable leases to private parties. No more than one-half of one percent of the park lands were ever leased to private parties. No Indian jurisdiction was ever exercised in the park after conveyance. In 1975, the Coeur d'Alene Tribe, in a memorandum to the U. S. Department of Interior, questioned whether these leasing practices violated the patent restriction. As a result, the United States threatened suit to reenter the land. The State of Idaho sought declaratory judgment in the United States District Court for the District of Idaho that the patent was not violated. Jurisdiction to hear the suit was predicated on 28 U.S.C. §§ 2201, *et seq.* The United States filed separate suit in the same court seeking to exercise the right of reentry and quiet title to the property. Jurisdiction to hear that action was founded on 28 U.S.C. § 1345. The suits were consolidated for trial and the Tribe and Leaseholders were granted limited leave to intervene.

By agreement of the parties, the case was submitted to the district court for summary judgment on stipulated facts, including a view of the property. The district court granted judgment in favor of the State and Leaseholders. The United States and Tribe timely appealed. However, the United States later moved to dismiss its appeal. The Ninth Circuit granted dismissal and denied the Tribe's motion for rehearing. The Tribe never petitioned the district court for full party status. Prior to oral argument of the appeal, the State moved for involuntary dismissal of the Tribe's appeal because the Tribe lacked title or interest in the reversion and was bound by the United States' dismissal. At oral argument on the Tribe's appeal, the Ninth Circuit also heard argument on the motion to dismiss. The court remanded for the limited purpose of determining the Tribe's interest in the reversion. The district court found that the Tribe lacked any interest in the reversion, basing its analysis on *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

The Ninth Circuit distinguished the *Rosebud Sioux* line of cases as diminishment rather than extinguishment cases, and relied on authority derived from *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920), to find that the Tribe had a beneficial interest in the public park lands. The Ninth Circuit also found that 28 U.S.C. § 1362 authorized the Tribe to proceed with the case, even though the United States had dismissed its appeal. After finding jurisdiction to proceed, the Ninth Circuit remanded to the lower court for a determination of the nature and extent of the Tribe's beneficial interest.

ARGUMENT

This petition seeks review of a decision of the United States Court of Appeals for the Ninth Circuit which, contrary to principles of law settled in this court and other circuits, extends the federal trust responsibility to Indian lands withdrawn from allotment and settlement and conveyed to a state. It also permits separate appeal by an Indian tribe, even though the United States, acting as trustee for the tribe, has dismissed its appeal. The decision remands the case to the district court and thus has interlocutory aspects. However, the remand is on a subsidiary issue—construction of a reversion clause in a patent. Thus, the decision is final as to the issues of federal trust responsibility. *See, City of New Orleans v. Dukes*, 427 U.S. 297 (1976). The remand leaves open the possibility that the Tribe's beneficial interest is not sufficient to invoke reentry, which if determined and upheld, could preclude further review of this matter.

- I. The 1908 Act authorizing the sale of the Heyburn State Park lands to the State of Idaho extinguished Indian title, disestablished the Couer d'Alene Reservation, and ended trust status as to those lands. As a result thereof, the right of reentry inserted in the 1911 Patent runs to the United States legally and beneficially.**

After the United States dismissed its appeal, the State of Idaho raised the issue of the Coeur d'Alene Tribe's interest in the right of reentry because the patent vested the title to the reentry solely in the United States. The Tribe argues that its interest derives from the trust status of the land conveyed and the resultant presumption

that the United States was acting for the benefit of the Tribe.

The district court found a termination of the trust responsibility in the Heyburn Act of 1908 by extinguishment of tribal title and diminishment of the reservation. The Ninth Circuit disagreed on all counts, finding neither extinguishment nor diminishment and, consequently, no termination.

The Ninth Circuit's conclusion that the Heyburn Act of 1908 did not extinguish tribal title is wrong. Indian title can be extinguished by agreement, *purchase*, force or otherwise. *United States v. Santa Fe Railroad*, 314 U.S. 339 (1941). Congress authorized the Heyburn Park lands to be conveyed to the State of Idaho for use as a public park and directed that the "proceeds of such *sale* . . . be deposited in the treasury of the United States for the use and benefit of the Coeur d'Alene Tribe." 35 Stat. 70, 79. Congressional intent to extinguish title in the Tribe and convey it to the State of Idaho is not only clear—it is unmistakable.

Closer analysis is required to determine whether the Heyburn Act of 1908 not only extinguished title but also disestablished the Coeur d'Alene Reservation as to the Heyburn Park lands. The Ninth Circuit's examination of this issue is hard to follow because it fails to differentiate among extinguishment, diminishment and termination of the trust responsibility. Although the Ninth Circuit noted that this was not an allotment and settlement case, it failed to extend the analysis and note the fundamental inconsistency between conveyance of the lands to the State of Idaho for use as a public park and continued reserva-

tion status of the lands. This fundamental inconsistency should have directed the court's decision. *See, e.g., Solem v. Bartlett*, — U.S. —, 52 U.S.L.W. 4257 (1984) at n.12 (discussion of *de facto* diminishment).

II. The Ninth Circuit erred when it extended the rule in Ash Sheep Co. v. United States, 252 U.S. 159 (1920) to the lands conveyed to the State of Idaho.

The Ninth Circuit relied on authority derived from *Ash Sheep Company v. United States*, 252 U.S. 159 (1920), to hold that neither boundary diminishment nor title extinguishment necessarily sever the trust relationship as to Indian lands. However, this Court has never extended *Ash Sheep* so far. Heretofore, *Ash Sheep* has been limited to trusts imposed pending disposition of opened lands. It has never supported a trust relationship after disposition of the land.

This is not a proper case for an extension of *Ash Sheep*. The United States discharged its land trust responsibility to the Tribe when the proceeds from the sale were deposited in the United States Treasury to the Tribe's benefit. Further supervision of the lands on behalf of the Tribe is unnecessary. When the trust is terminated, the right of reentry runs solely to the United States.

III. Voluntary dismissal by the United States preclude the Tribe from appealing this matter.

The Ninth Circuit held that the United States' voluntary dismissal of its appeal of the district court decision did not preclude the Tribe from pursuing an independent

appeal. The circuit court so held even though the United States instituted the action at the Tribe's behest. The court did not consider that the Tribe had been granted only limited status as intervenor. The district court held that the United States adequately represented the Tribe's interests. In granting leave to intervene, this decision has never been challenged by the Tribe.

The Ninth Circuit's holding on this issue is contrary to principles of Indian law established by this Court, the Ninth Circuit, and other circuits. The case of *Heckman v. United States*, 224 U.S. 413 (1912), is most persuasive in this regard. There, this Court held that:

. . . if the United States, representing the owners of restricted lands, is entitled to bring a suit of this character, it must follow that the decree will bind not only the United States, but the Indians whom it represents in the litigation. This consequence is involved in the representation. (Cites omitted.)

224 U.S. at 445.

The proposition was reaffirmed in its entirety by this Court in the case of *Chicago R.I. & P.R. Co. v. Schendel*, 270 U.S. 611 (1925). There, the Court went on to say that:

Since the statutory authority of the administrator is to sue, not in his own right or for his own benefit or that of the estate, but in the right and for the sole benefit of the widow, the same principles are applicable, in accordance with the general rule that "whenever an action may properly be maintained or defended by a trustee in his representative capacity without joining the beneficiary, the latter is necessarily bound by the judgment." (Cites omitted.)

270 U.S. at 620.

In *Arizona v. California*, — U.S. —, 51 U.S.L.W. 4325 (1983). The court stated that ". . . the Tribes' interests . . . will continue to be determined in this litigation since the United States' action as their representative will bind the Tribes to any judgment. *Heckman v. United States*, 224 U.S. 413, 444-45, 56 L.Ed. 820, 32 S.Ct. 424 (1912)." 51 U.S.L.W. at 4328.

The Ninth Circuit has adopted the same rule in *United States v. Truckee-Carson Irrig. Dist.*, 649 F.2d 1286 (1981). There, the court said that:

. . . when the government as a trustee in good faith adequately represents the Indians they are bound by any ensuing judgment. . . . The Tribe's rights in this case, thus, have familiar dimensions. In general, representation by the United States will bind an Indian tribe and the individual Indians. See *Heckman v. United States*, *supra*, 224 U.S. at 445-46, 32 S.Ct. at 434-435; * * * *Pueblo of Picuris v. Abeyta*, 50 F.2d 12, 13 (10th Cir. 1931); * * * (Cites omitted.)

649 F.2d at 1306-07. See also, *Cheyenne River Sioux Indians v. United States*, 338 F.2d 906 (8th Cir. 1964), cert. denied, 382 U.S. 815 (1965); *Mars v. McDougal*, 40 F.2d 247 (10th Cir. 1930).

Pueblo of Picuris v. Abeyta, 50 F.2d 12 (10th Cir. 1931), is particularly in point. There, the United States had instituted an action to quiet title to certain lands on behalf of the Pueblo. The decision of the district court was adverse to the United States as to some of the lands. The United States declined to appeal although urged by the Indians to do so. The Tribe then appealed the district court decision on its own. The respondents moved to dismiss the appeal. The Tenth Circuit, in granting dismissal of the Indians' appeal, held that:

There cannot be divided authority in the conduct of litigation; divided authority results in hopeless confusion. If the United States has power to dismiss with prejudice prior to trial, as has been held, it certainly has power to decline to appeal after trial.

50 F.2d at 14.

The only circumstances where separate tribal representation should be allowed after the United States has initiated an action are those situations where the interests of the United States are in conflict with those of the Tribe, where both parties have separate property interests, or where there has been some case of fraud or collusion on the part of the United States. *United States v. Truckee-Carson Irrig. Dist.*; *supra*, at 1307, n. 18. See also *Arizona v. California*, *supra*, 51 U.S.L.W. at 4331.

In the present case, there is no conflict of interest between the Tribe and the government over the subject property. Both have clearly alleged throughout the course of these proceedings that the United States holds any right of re-entry in trust for the Tribe. Nor is there any fraud or collusion on the part of the government. None has been alleged by the Tribe and none exists. The United States has vigorously and adequately represented the interests of the Tribe throughout the course of this litigation. Thus, absent some showing of conflict or inadequate representation, the Tribe is bound by its trustee's decision to dismiss the appeal.

CONCLUSION

The preceding arguments clearly indicate that the Tribe has no beneficial interest in the right of reentry contained in the 1911 patent and is therefore precluded from prosecuting this appeal.

The facts show that it was the intent of Congress to extinguish Indian right, title, and interest in Heyburn State Park by the passage of the 1908 Act. Thus, the United States was acting on its own behalf when inserting the right of reentry in the patent.

The State of Idaho paid full value for the property. Furthermore, the reversion was clearly intended to benefit the United States and the public as a whole, not the Tribe.

Finally, the Tribe chose original representation by the United States. It is therefore bound by the government's decision not to appeal in this matter.

Respectfully submitted,

JIM JONES
Attorney General
State of Idaho

/s/ ROBIE G. RUSSELL
Deputy Attorney General
Chief, Local Government
Division

/s/ C. A. DAW
Deputy Attorney General
State Tax Commission
Room 210, Statehouse
Boise, Idaho 83720
Telephone: (208) 334-2400